Supreme Court of the United States

OCTOBER TERM, 1911.

No. 19

GERMAN ALLIANCE INSURANCE COMPANY,
Petitioner,

vs.

HOME WATER SUPPLY COMPANY,
Respondent.

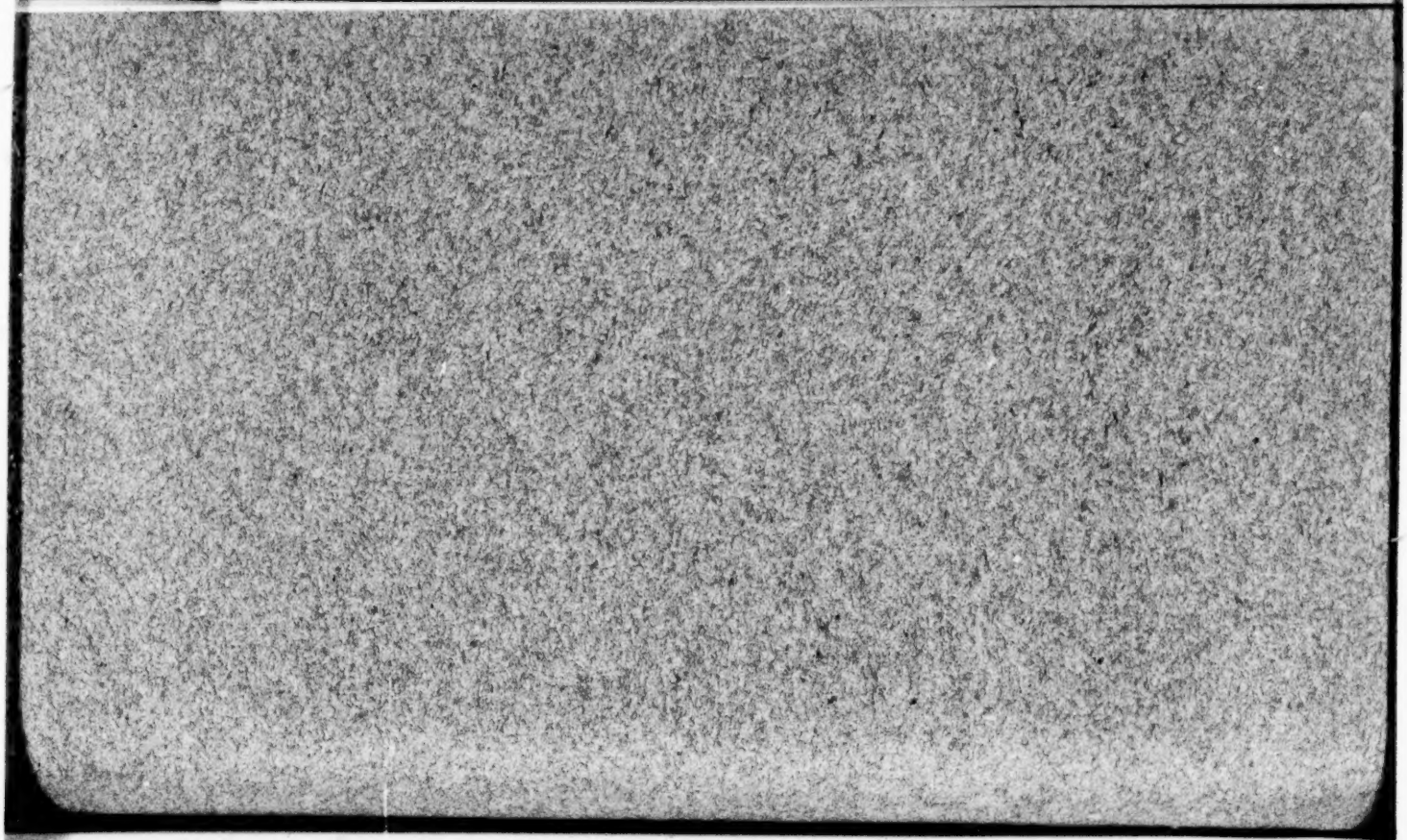
BRIEF FOR RESPONDENT

I. A. PHIFER,
Of Counsel for Respondent.

RALPH K. CARSON,
Attorney for Respondent.

KIRKLAND & SMITH,
Of Counsel.

BAND & WHITE, PRINTERS, SPARTANBURG



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No. 232.

GERMAN ALLIANCE INSURANCE COMPANY,
Petitioner,

vs.

HOME WATER SUPPLY COMPANY,
Respondent.

Brief for Respondent.

The statement of facts in the brief of petitioner is correct in the main but incorrect in some of the details as to what the complaint really alleged and what the contract between the Water Supply Company and the City of Spartanburg really was in the following particulars:

Home Water Supply Company did not "undertake to furnish an adequate supply of water for fire protection with respect to the property of the residents of Spartanburg for a period of thirty-three years" (f. 2), but they were "authorized and empowered to maintain, etc., waterworks—to supply the city and its inhabitants with—water, suitable for fire, sanitary and domestic purposes"—"to use—streets—" which may be necessary for proper distribution throughout said city so as to effect the most adequate supply for domestic use and greatest protection against fire"—"for the

term of thirty-three years from first of January, 1900" T. or R. F. 4.

The contract did not provide "that the water company should establish all mains necessary for the distribution of water throughout the city—so as to effect the most adequate supply for domestic use and greatest protection against fire," nor were "the mains to be less than six inches in diameter unless permission were granted by the City Council." F. 2.

The contract was (T. of R. F. 7): "There shall be not less than six miles of pipe in all, ranging in size from 10 to 4 inches, for distributing water throughout said town—"

"Section 6. And the city may at any time require the said grantees to make extensions of the pipe system of the said waterworks, by giving sixty days notice to said grantees." T. of R. F. 6. It is noticeable that the complaint does not allege that any *notice* whatever was ever given, but merely that in 1905 and 1906 the City Council ordered the company to put in certain hydrants with connecting pipe, which order, if obeyed, would have carried water protection" 450 feet nearer to the fire on March 25th, 1907. T. of R. F. 12.

The complaint (allegation 10) does not pretend to allege there was no electrical appliance or that the appliance that was in use was defective in any particular, but merely "that the defendant company further failed and neglected to discharge its duty to said property and its owner * * * in not having the electrical appliance called for in Section 4 of said contract," thereby alleging a legal conclusion and an allegation pregnant, in that it is not alleged in what particular the appliance used was defective. It is also a legal conclusion as to what is "sufficient" pressure "or anything like it." As to the other specifications of negligence "in not having a pipe of sufficient size at the nearest approach to said locality; at least six inch pipe instead of inadequate four inch pipe," will state there is no provision in the contract as to what size pipe should be laid on different streets or in different localities. With the same propriety he could have alleged that defendant was negligent in laying any four

inch pipe at all, though the contract expressly provides he may do so.

Argument.

Though it is not conceded, if the complaint does allege specific acts of negligence which would ordinarily constitute a cause of action, if there was such a privity between the plaintiff and the City of Spartanburg as would entitle the plaintiff to bring this action, then practically but one question is raised by the plaintiff's exceptions to the opinion rendered by the United States Circuit Court of Appeals, to wit: Does immunity from liability attach to a private corporation under contract with a municipality to provide water for general purposes for fire losses, due to its negligent failure to furnish a proper water supply as required by its contract, when hailed into Court by a taxpayer owning property within the limits of such municipality? The specific acts of negligence which the plaintiffs claim to have alleged, and upon which they rely are:—

(a) Want of pressure.

(b) Failure to extend the water mains when ordered by the City Council, and construct plant in accordance with contract with City Council.

In discussing this question of liability on the part of the defendant for the loss of the plaintiff's property, under the circumstances alleged in the complaint, we desire to present the question involved in connection with the following propositions:

1. That the plaintiff, as a taxpayer and citizen of the City of Spartanburg, under the allegations contained in the complaint, does not sustain any contractual relation with the defendant company.

3. That the plaintiff cannot maintain this action if it be viewed as an action ex contractu, in the absence of a contract relation.

3. That the plaintiff, under the allegations contained in the complaint, cannot maintain this action if it be viewed as an action ex delicto, because the complaint shows that the alleged loss of the buildings therein described, as the

result of its failure to comply with its contract with the municipality, is not a loss by one sustaining a contract relation with the defendant.

4. That this action is based upon an alleged careless and wilful breach of duty growing out of the contract between the defendant and the City Council of Spartanburg, to which plaintiff is not a party or in privity therewith, and is not an action for tort in any other sense.

5. That if the contract between the defendant company and the municipality creates a duty on the part of the water company, then the contract must be the measure of that duty and of the liability involved.

6. That inasmuch as the City of Spartanburg would not be liable for damages under the allegations of the complaint if the said city was operating the waterworks, there are no legal obligations owing from the city to its property owners and taxpayers which would make a contract of this kind available to the individual property owner.

7. That the alleged breach of contract is not the proximate cause of the loss sustained by the plaintiff.

A careful examination of this contract between the city and the waterworks fails to disclose anything therein which would even tend to establish any direct contractual relation between the plaintiff and defendants in its stipulations and limitations. It may be said that this contract is characteristic of its class, and while as the Court remarks in the case of *Mugge vs. Tampa Waterworks*, 6 L. R. A. (N. S.) 1176, "The terms and conditions of the various contracts are not always alike, but the doctrine of the want of privity of contract between a property owner and the water company runs through them all." There is practically no feature in the contract set out in the complaint which will destroy or even impair the force of that vast array of judicial decisions against the liability of a water company under the circumstances here involved, so far as the terms of such contract are gathered from statement and reference to the same in such decisions.

When the opinion was handed down by the State Supreme Court in the case of *Mugge vs. Tampa Waterworks Co.*,

supra, the editors of the L. R. A. considered it so unusual and revolutionary that they deemed it necessary to attach an extensive case note which covers the matter so fully I feel it should be incorporated herein, to wit:

"Liability of water company in tort for loss to one sustaining no contract relation with it by its failure to comply with its contract with the municipality:

"Unless the Court has intended to adopt in the above case a principle to which, although discussed, it does not expressly commit itself, the decision is so unprecedented in the law of torts, and the consequences of its application are so far reaching, as to make it almost revolutionary. A liability in tort is always based on a breach of duty. And in order to entitle one to maintain an action, he must show that the person guilty of the tort owed him some special duty which will give him a standing in Court. To enable one whose property has been destroyed by failure of a water company to furnish water to maintain an action in tort against the company he must show a contract relation with it. It is the necessity of this contract relation to which the Court fails clearly to commit itself, and what it says on the subject is so indefinite that unless the necessity for such relationship is kept in mind, the decision is apt to be misleading. In fact, it is somewhat difficult, even after a careful study of the opinion, to determine on what theory the Court actually proceeds to establish the liability of the water company, and a superficial reading leaves the impression that the Court resorted to the tort theory to avoid the necessity of committing itself upon the contract theory, in respect to which the decisions are hopelessly in conflict. From the emphasis which the Court places upon the opinion of the Supreme Court of the United States in *Guar. Trust and D. Co. vs. Fisher*, 200 U. S. 57, 50 L. Ed. 357, the impression is strong that the Court abandoned the idea of the necessity of a particular duty owing to the individual injured, to sustain the action. If such is the intention the holding is certainly far in advance of any-

thing which has preceded it. Such an intention would not be surprising in view of the very loose and unsatisfactory reasoning of the Supreme Court of the United States in the Fisher case. That case arose under the law of North Carolina. In that State the Court has established the rule that the taxpaying property owner is the real party in interest to a contract by a municipality which acts as his agent with a water company for a supply for fire purposes. *Gorrell vs. Greensboro Water Supply Co.*, 124 N. C. 328, 46 L. R. A. 513. This being true, the property owner has in that State a right of action on the contract for its breach. Therefore he comes into such a relation with the water company that, in case of its failure to perform its duty as a public service corporation to his injury, he may, under well established principles, declare in tort or in contract, at his discretion. This is all that the Court decided in the case of *Fisher vs. Greensboro Water Supply Co.*, 128 N. C., 38 S. E. 912. And this is all that the United States Circuit Court, or the United States Supreme Court, had to decide in passing upon the correctness of the action of the North Carolina Court in entering the judgment in tort rather than in contract. *Guardian Trust and D. Co. vs. Greensboro Water Supply Co.*, 115 Fed. 184; *Guar. Trust and D. Co. vs. Fisher, supra.* Furthermore, it appears from the opinion of the Supreme Court in the Fisher case that *one of the ordinances under which the water company was acting provided that the water company should be responsible for all damage sustained by the city or any individual or individuals from the negligence of the company in either the construction or operation of the plant.* The liability of the company to the injured property owner is therefore established, either because of the special provision of the ordinance, *or by reason of the contract relation between the property owner and the water company.* But both the United States Circuit Court and the United States Supreme Court fail to mention these facts in their statements of the principles upon which the liability of the

water company depends. The opinion of the Circuit Court simply goes to the extent of holding that, because of the character of the public service it has undertaken, the water company had assumed an obligation, the breach of which would render it liable in tort, but the Court intimates no opinion on the right of the plaintiff to maintain the action. The Supreme Court of the United States, however, while correct in its conclusion that the judgment might properly be entered in tort, is exceedingly unfortunate in the reasoning by which it reaches such conclusion. It cites no authority in point upon the subject, but gives certain illustrations of the liability of persons undertaking a certain duty in case they negligently fail to perform their undertaking. It says, "Even if the water company was under no contract obligations to construct waterworks in the city, or supply the citizens with water, yet having undertaken to do so, it comes under an implied obligation to use reasonable care, and if, through its negligence, injury results to an individual, it becomes liable to him for the damage resulting therefrom, and the action to recover is for tort, and not for breach of contract." It will be observed that the Court makes no distinction between injury resulting through nonfeasance and one resulting from misfeasance, which distinction is very material in dealing with liability upon this question. As illustrations to support its conclusions, it assumes that a company is chartered to construct and operate a railroad. Nothing may be said in the charter in reference to the manner in which the road shall be operated or the particular acts which it must do. If, from undue speed, failure to give proper warnings, or other like acts or omissions, individuals are injured, they may recover for such injuries, and their actions to recover sound in tort. It requires no argument to show that this is the ordinary case of liability for one injured by misfeasance, and the question of public service is utterly immaterial. Again it says: 'If a railroad contracts to carry a passenger, there is an implied obligation he will be carried with reasonable care for his safety. A failure to

exercise such care, resulting in injury to the passenger, gives rise to an action ex contractu for breach of the contract, or as well to an action for the damages on account of the negligence—an action sounding in tort.' Here the relationship which gives the passenger the right to sue is founded on his contract. Again the Court says, a surgeon 'may be under no obligation, in the absence of contract to assume the treatment of an injured person, but if he does undertake such treatment he assumes, likewise, the duty of reasonable care in such treatment.' The liability here is the mere contract liability to use the skill which he assumes to possess. And the liability would be for misfeasance rather than nonfeasance. Again, the Court says the owner of a lot is not bound to build a house or store thereon, but if he does so, he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others. This again is a case of misfeasance and not nonfeasance. These are all the illustrations upon which the Court founds its conclusion, *and they come far short of establishing the fact that one of the public having no special relation to the public service corporation may sue for injuries caused by breach of its public duty.* If, through negligence, a railroad company fails to transport a sufficient supply of coal into a particular section of the country during severe weather, is it liable to every one who suffers from the cold by reason of its negligence? Again, a train is wrecked through negligence, is the company liable for one who, at a station not yet reached, was waiting to take the train to meet an important engagement further down the road? Again, a railroad builds a branch into a region suitable for a summer resort, relying on the presence of the road a hotel is built to accommodate the public, by reason of the negligence of the road in failing to meet its schedules, the public refuse to patronize it, and the hotel is a failure, can the proprietor maintain an action against the railroad company for his loss? The general understanding has been that in none of these cases would an action lie, because the public cor-

poration owed no duty to the particular individual to whom the injury was caused. The few cases cited to support the rulings by no means tend to do so. In *Coy vs. Indianapolis Gas Co.*, 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17, a natural gas company undertook to supply a certain municipality with its gas. It entered into a contract with the householder to furnish gas to him and pipe the gas into his house, thereafter in cold weather he negligently failed to maintain the pressure, to the injury of the consumer. He brought an action and recovered in tort, the right to recover in tort being based on breach of the public duty, but his right to maintain the action arose out of the particular duty due him under the contract. Would the gas company have been liable to one in case it had merely failed to pipe gas into his house, after being requested to do so, for injuries from cold due to the absence of gas? In *Lambert vs. Laclede Gas Light Co.*, 14 Mo. App. 376, a gas company had undertaken by contract with the municipality to light the streets and maintain the lamps and posts in safe condition. By accident a post was knocked down and obstructed the sidewalk, so that a passerby stumbled over it and was injured. He brought an action setting up the contract by which the gas company had undertaken to care for the post, and the Court, while deciding that in the particular case no negligence was shown, devotes a considerable portion of its opinion to establishing the right to sue upon the contract. The contract in the case was immaterial, excepting as it showed the responsibility of the gas company for the accident. The case was the ordinary one of obstruction of a public way and injury therefrom, which would establish a right of action in favor of the person injured, and the only effect of the contract in the case was to show who was responsible for the obstruction. The plaintiff's right of action did not depend upon the public undertaking or contract of the defendant, but upon the fact that it had obstructed a public highway, which was a case of misfeasance, and not nonfeasance. Would the light company have been

liable to one injured by a defect in the highway merely because it had negligently failed to keep a light burning? Even the cases which have held a railroad company liable for failure to furnish cars have usually gone upon the ground of discrimination or, like the recent Mississippi case of *Yazoo and M. Valley Railroad vs. Blum Co.* (Miss.), 40 So. 748, because it had actually received the property for transportation and thus came into a contract relation with the shipper which it negligently failed to perform.

"In jurisdictions where a contract relation between a taxpayer and a water company is recognized there can be no question but that the judgment can be entered either in contract or tort, and it may be very advantageous to the plaintiff to proceed in tort rather than in contract, for, as pointed out in *Coy vs. Ind. Gas Co., supra,* the damages in action of contract must be such only as would be the natural result of the breach for such as were within the reasonable contemplation of both parties, while in tort this limitation does not prevail, but all damages may be recovered which are directly traceable to the wrong done, and arise without an intervening agency and without fault of the injured person himself. In an action for tort, therefore, the only question that can arise upon the question of damages is one of proximate cause, while the action of contract the question what damages would be within the contemplation of the parties would be very material and it is exceeding doubtful if the contract liability of the water company could be shown to cover the value of the buildings destroyed through its mere failure to furnish water pressure.

"In the jurisdiction, however, in which the contract relation of the taxpayer to the water company is not recognized, which, as shown in the case of *Lovejoy vs. Bessemer Waterworks Co.*, 6 L. R. A. 429, are greatly in the preponderance, the action ex delicto will not lie any more than the action ex contractu, because there is no relation between the taxpayer and the water company or no special duty owing by it to him, failure to

perform which can be regarded as an injury to him, the existence of which, under the law of torts, is necessary to the maintainance of the action. This is an element which the Supreme Court of the United States failed to bring out, and this failure seems to have misled the Court in *Mugge vs. Tampa Waterworks Co.* into the adoption of reasoning in support of a decision which is not founded on principle. Before the Court could reach such a conclusion, it must first conclude that the taxpayer has a contract relation with the waterworks company which will give him a right to maintain the suit.

"The above conclusion is supported by the cases which have directly dealt with the question involved. Some of the Courts which have denied liability of the water company have adopted language general enough to apply to liability in tort as well as in contract, but since they did not expressly consider the liability in tort their reasoning cannot be regarded as directly in point. The Supreme Court of Wisconsin, however, expressly considered the question of liability in tort. The complaint in the case founded the liability first upon the breach of contract, and second upon neglect of duty; the Court, after determining that there was no liability for breach of contract, took up the question of liability for neglect of duty and held that the municipal ordinance constituting a contract did not impose upon the water company a statutory duty which would give a right of action to the individual taxpayer, and that no action could grow out of a contract, since it did not impose upon the water company a special or personal duty to a taxpayer which was necessary to sustain the action in tort. *Britton vs. Green Bay and Ft. H. Waterworks Co.*, 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84.

"The Texas Court, in *House vs. Houston Waterworks Co.*, 88 Tex. 233, 28 L. R. A. 532, 31 S. W. 179, have also carefully investigated the question. It determined that the taxpayer cannot sue on the contract, and then stated that it was claimed that he could sue in

tort. The Court, in denying the claim, states that negligence which consists merely in the breach of a contract will not afford a ground of action by anyone who is not a party to the contract nor a party for whose benefit the contract was avowedly made. It states that the water company had not been guilty of a breach of duty which it owed the plaintiffs apart from the contract or growing out of any relations between them created by or arising out of contract, that under the contract the duty was owing to the city and not to the citizen, and is not, therefore, such a duty as would give a right of action by a failure of performance to the individual who may be injured thereby. The Court further says it is no answer to quote the well-established rule that a person or corporation that undertakes the performance of a public duty is liable to any person injured thereby for a negligent failure to perform their duty. It must first be established that the duty is to the individual before the rule is applicable.

"Again, in *Fowler vs. Athens City Waterworks Co.*, 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673, the Georgia Court, after determining there was no liability ex contractu, asked, 'Is the action better founded treating it as one ex delicto?' It proceeds, 'We think not. The violation of a contract entered into with the public, the breach being by mere omission, or nonfeasance, is not tort direct or indirect to the private property of an individual though he be a member of the community and a taxpayer to the government. We are unable to see how a contractor with the city to furnish water to extinguish fires commits any tort by failing to comply with its undertaking unless to the contract relation there is superadded *a legal command by statute or express law*.'

"The reasoning of the Georgia Court is supported in *Nichols vs. Huntington Water Co.*, 53 W. Va. 348, 44 S. E. 290, to support his conclusion that, after denying the liability in contract, a different conclusion cannot be reached by applying the principles governing actions ex delicto.

"The reason of the Georgia Court is also adopted in *Fitch vs. Seymore Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 92.

"In *Nickerson vs. Bridgeport Hy. Co.*, 46 Conn. 24, 33 Am. St. Rep. 1, the question arose upon demurrer to complaint. The complaint was in three counts. The first merely alleged the duty of the water company to furnish water supply and its failure to do so. The second relied on the contract between the water company and the municipality, the third, after setting out the contract, alleged that the water company negligently failed to comply with it, to the plaintiff's injury. The Court, after holding there was no liability under the contract, states that there being no contract relation between plaintiff and defendant, consequently there was no duty which could be the basis of a legal claim. *The absence of duty owing by the water company to the complaining taxpayer has, therefore, by all the Courts which has directly considered the question, been regarded as fatal to the maintainance of an action in tort.*"

It is inconceivable how the plaintiff can contend that the question of whether an action for tort would lie was before the Court for decision in *Guardian Trust Company vs. Fisher*, for in that case, when the matter was before the Circuit Court of Appeals, the Court expressly said:

"This brings us to the question in the case: Have those judgments a lien prior to the lien of the mortgages? Are these judgments 'for torts committed by the corporation, its agents or employees' whereby property was injured? The interveners produce the judgments in each case, which distinctly state that damages are given 'for the tortious injury and damage done by the negligence of the defendant.' The Supreme Court of North Carolina held in this case that, under the facts in the case, the plaintiff was entitled to declare in tort; that 'although action may have been maintained upon a promise implied by law, yet an action founded on tort was the more proper form of action, and the plaintiff so declared.' *Fisher vs. Supply*

Co. (N. C.), 38 S. E. 914. *This judgment is entitled to full faith and credit.* As between the corporation and the plaintiff it would be conclusive. It is presented in a cause in which mortgagees are parties; *and the question is not whether the judgment be valid, but whether it is a judgment of such a character as it will be given priority to the claim of the mortgagees who were not parties to the suit in which it was obtained.* 'When such a judgment is presented to the Court for affirmative action, while it cannot go behind the judgment for the purpose of examining into the validity of the claim, it is not precluded from ascertaining whether the claim is really one of such a nature that the Court is authorized to enforce it.' *Wisconsin vs. Pellican Ins. Co.*, 127 U. S. 263, 8 Sup. Ct. 1370, 32 L. Ed. 239."

It is a noticeable fact, conspicuous by its absence, that the complaint does not allege the existence of an ordinance in effect in the City of Spartanburg under which the water company was acting which provided that the water company should be responsible for any or all damage sustained by the city or any individual from the negligence of the company in either the construction or operation of the plant; whereas, the existence of such an ordinance did appear in the opinion in the Fisher case, and while the existence of this ordinance was not stressed in the Supreme Court of the United States, such fact could well have formed the basis of the judgment when it was first rendered in the North Carolina Court.

And while it was a rule of law in North Carolina when judgment was rendered in favor of the judgment creditors that the taxpaying property owner is the real party in interest to a contract by a municipality which acts as its agent with a water company for a supply for fire purposes, *Gorrell vs. Water Supply Co., supra,* no such rule of law prevails in South Carolina. On the other hand, in the case of *Black vs. City of Columbia*, 19 S. C. 412, "The plaintiff brought action for damages against a municipal corporation, based upon the destruction of his house by fire, resulting from an inadequate supply of water, to a sufficient

supply of which he claimed to be entitled by reason of a water tax assessed upon such property by the city, and paid by him. Held on demurrer that the act was for tort, and therefore, as against a municipal corporation, could not be maintained." Syllabus. A case more in point is that of *Ancrum vs. Camden*, 82 S. C., in which the plaintiff sought to hold the defendant liable in an action ex delicto for damages by reason of the company's negligent failure to furnish water. The Court held that the municipality was not in any legal sense the agent of its inhabitants, either singly or collectively, and denied the plaintiff's right to recover, holding that the theory that the municipality was her agent did not apply. The Court further held that the municipality could have made a contract with the defendant by which the defendant would have assumed liability to the inhabitants, saying, however, the pivotal question occurs whether the City of Camden did make a contract imposing that liability on the water company. The pivotal question here is, did the Home Water Supply Company contract with the City of Spartanburg to assume liability for lossess occurring by reason of negligence in the performance of its duty? The decision of the Supreme Court of South Carolina in *Ancrum vs. Camden Water, Etc., Co., supra*, should, we submit, be very persuasive in view of the fact that the contract in the case at bar is very similar to the contract in the case of *Ancrum vs. Camden, supra*. The Court in the last mention case observes:

> "In the first place, it is to be observed that the presumption is that parties contract for their own benefit and not for that of others not parties to the contract. So a contract entered into by a city is presumed to be for the city's own benefit, as a municipality, that is for the benefit of the municipal public as a whole, and not for the benefit of its inhabitants as individuals. Hence in order for the plaintiff to have the benefit of the contract, it is not sufficient for him to show that the defendant contracted with the city to have an adequate supply of water to extinguish fires, but he must show further, that it was intended that he should be the di-

rect beneficiary of this provision to the extent that the defendant should indemnify him for his fire losses due to its negligence. There will hardly be difference of opinion that there are many public municipal purposes to be attained by a contract of this sort leaving out of view the citizen as an individual. The general municipal purpose of a water supply is to promote the prosperity of the city. This it does by lessening the risk of destruction of property by fire, by lowering the rate of insurance, increasing the general sense of security, and therefore the general happiness, diminishing the risk of numbers of persons being thrown out of employment, and generally in giving steadiness and confidence to the life and enterprise of the city. These are the inducements to the city for entering into the contract, and it is for these municipal purposes that it pays for the maintenance of waterworks for fire protection. For the attainment of these municipal ends the city has the right to pay out public funds. It may well be doubted whether it has the right to apply public funds to the larger compensation which a water company of necessity must charge for the enormous peril of having to pay for all private property lost by its negligence. Such expenditure of municipal funds raised by taxation of all the property would be an unjust discrimination in favor of those whose property is exposed to fire loss and against those whose property is not subject to that peril. There is at least a strong presumption against a municipality undertaking to pay for such indemnity from the public revenue. True, the water company would be liable only for losses due to its negligence. But the negligence would be chargeable to the company for its inspector of machinery to overlook a defect which he ought to have observed in time to remedy it, for a pumper to fail in his duty, for an employee carelessly to break a main so that the water would be wasted, for the company to have adequate machinery; in brief for it to fail in the opinion of the jury to be diligent in almost any of the innumerable details incident to the conduct of such a business. In

addition to this it is considered, as held in some jurisdictions, that the action for losses in a case like this is an action for tort, then for their fire losses the insurance company would be subrogated to the rights of the owner of the property and entitled to recover from the water company. *Mobile Ins. Co. vs. Columbia and R. R. Co.*, 408, 44 Am. St. 731 note; *Aetna Ins. Co. vs. C. & W. C. Ry. Co.*, 76 S. C. 101, *Am. B. Co. vs. Nat., etc., Bank*, 44 Am. St. 504 note. That a water company assumed such liabilities would have to demand a very large compensation to have any profit or even to save itself from bankruptcy is most obvious. When it is asserted that a city has undertaken to pay such indemnity to its individual inhabitants, and that the water company has assumed it, the contract relied on ought to show clearly that such payment by the city and indemnity by the water company were intended.

"The contract now under consideration contains no direct undertaking to respond to the individual inhabitant for fire losses; the stipulation that it shall keep a sufficient water supply for the protection of public and private property is naturally to be referred to the purpose of the city to promote the general municipal welfare in the manner we have pointed out, rather than to indemnify individual property owners from fire loss. The compensation to be paid is fifty dollars each for seventeen hydrants, a sum on its face utterly inadequate to meet the expenses of furnishing the water and to afford compensation for the enormous risk the plaintiff insists was assumed. These considerations seem to show plainly that the parties did not contemplate by their contract the assumption of liability by the water company for the plaintiff's fire losses arising from its neglect to furnish an adequate water pressure.

"We conclude that the obligations and liabilities of the parties are limited by the contract, and that the defendant did not contract to pay the losses of all the citizens of the City of Camden by fires which would have been extinguished if it had not neglected to comply with its contract."

If the plaintiff had been the loser in the first instance, being a non-resident, it is possible, though we shouldn't say probable, that this Court could disregard the law as uttered by the highest Court of this State, but when we take into consideration the fact that had the action been brought by Spartan Mills, the original loser, such action would have had to have been brought in the State Courts, and such being the case, the Court of this State would more than likely have followed its decision in the preceding case. By what system of reasoning then would the plaintiff, who is merely subrogated to the rights of the Spartan Mills, have a greater right than the original loser? The statute of South Carolina provides (Code of Civil proc., Sec. 145): "Actions for the following causes of action must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the Court to change the place of trial: 1. For recovery of penalty or forfeiture imposed by statute * * *. 2. Against a public officer or a person specially appointed to execute his duties for an act done by him in virtue of his office * * *." Sec. 46, supra, is as follows: "In all other cases the action shall be tried in the county in which the defendant resides at the time of the commencement of the action * * *."

The language as to trial of action in county where defendant resides is imperative, and places the exclusive jurisdiction there. *Blakely vs. Frazier*, 11 S. C. 122; *Trapier vs. Waldo*, 16 S. C. 276; *Steele vs. Exum*, 22 S. C. 276; and if judgment be rendered in another county the objection to jurisdiction may be first raised in Supreme Court. *Ware vs. Henderson*, 25 S. C. 385; *Bell vs. Fludd*, 28 S. C. 313.

No right to sue in federal courts exists except in such cases as are expressly provided for by Federal Statute or the Constitution. *Band of U. S. vs. Deveaux*, 5 Chanch 61, 3 L. Ed. 38; and a citizen of this State would not be allowed to maintain his action in this State against another citizen of this State under Sec. 1 and Sec. 2 of Art. III of the Constitution of the United States, in a matter of this kind.

The Courts of the United States have always looked askance at anyone who has attempted to treat the municipality as his agent or as being directly answerable to him in the

conduct of its affairs, and has stated in substance "that no citizen can be heard to contend that the laws and ordinances under which a municipal water supply has been created and regulated are invalid because his individual and personal views have not been formally obtained and considered." *Parsons vs. District of Columbia,* 170 U. S. 45, 42 L. Ed. 943.

This Court has expressly stated, in the case of *St. Tammany Waterworks Company vs. New Orleans Waterworks Company,* 120 U. S., 30 L. Ed., page 565, in speaking of whose province it was to determine whether or not the public health would be better protected or the public comfort subserved in the matter of furnishing water, "that these are matters which neither the appellant nor individual citizens may determine for the constituted authorities."

In May, 1905, issue of 3rd Michigan Law Review No. 7, at pages 501-507, this question is very interestingly and ably reviewed in an article on the liability of water companies for fire losses. The review of the authorities is made with so much care, and contains so many valuable suggestions, that we take the liberty of quoting at length from the same, as follows:

> "The most striking feature of the water company's position is that in 19 jurisdictions where the exact question presented in this case has risen in *22* cases, the holding has been for the defendant as a matter of law. These jurisdictions include Connecticut (Nickerson vs. The Bridgeport Hydraulic Co., 46 Conn. 24 (1878), opinion by Park, C. J.); New York (Wainwright vs. Queen's Co. Water Co., 78 Hun. 146, 28 N. Y. Supp. 987, N. Y. Sup. Co. 1894), opinion by Brown, P. J.); Pennsylvania (Beck vs. Kittanning Water Co., 11 Atl. 300 (Pa. 1887); West Virginia (Nicholl vs. Huntington Water Co., 53 W. Va. 348, 44 S. E. 290 (1903, opinion by Paffenbarger, J.); Tennessee (Foster vs. Lookout Water Co., 3rd Lea 42 (Tenn. 1879), opinion by Cooper, J.); Georgia (Fowler vs. Athens City Waterworks, 83 Ga. 219, 9 S. E. R. 673 (1889), opinion by Bleckley, J. C.); Mississippi (Wilkerson vs.

Light, Heat and Water Co., 78 Miss. 389, 28 Sp. 877 (Miss. 1900), opinion by Boothe, Special Judge); Texas (House vs. Houston Waterworks Co., 88 Tex. 233, 28 L. R. A. 532, opinion by Brown, J.); Nevada, (Ferris vs. Carson Water Co., 16 Nev. 44 (1881), opinion by Belknap, J.); Idaho (Bush vs. Artesian Hot and Cold Water Co., 4 Idaho 618, 43 Pac. 69 (1895), opinion by Houston, J.); California (Town of Ukiah City vs. Ukiah Water & Imp. Co., 75 Pac. 773 (Cal. 1904), opinion by Henshaw, J.); Iowa, (Davis vs. Clinton Waterworks, 54 Ia. 59 (1890), opinion by Beck, J.); Becker vs. Keokuk Waterworks, 79 Ia. 419 (1890), opinion by Robinson, J.); Nebraska (Eaton vs. Fairbury Waterworks Co., 37 Neb. 546 (1893), opinion by Ryan, J.); Kansas (Mott vs. Cherryville Water Co., 48 Kan. 12, 28 Pac. 989 (1892), opinion by Horton, C. J.); Missouri (Howsman vs. Trenton Water Co., 119 Mo. 304 (1893), opinion by Brace, J.); Indiana (Fitch vs. Seymore Water Co., 139 Ind. 214, 37 N. E. R. 982 (1894), opinion by Howard, J.); Ohio (Akron Waterworks Co. vs. Brownless, 10 Ohio Cir. Ct. Repts. 620 (1895), opinion by Caldwell, J.); Blunk vs. Dennison Water Supply Co., 73 N. E. R. 210 (Ohio 1905); United States (Boston Safe Deposit & T. Co. vs. Salem Water Co., 94 Fed. 238 (1899), U. S. Cir. Ct. N. Gist. of Ohio. Of these twenty-two cases, arising in these nineteen jurisdictions, sixteen (Nicholls vs. Huntington Water Co., 53 W. Va. 348, 44 S. E. R. 290 (1903); Fitch vs. Seymore Water Co., 139 Ind. 214, 37 N. E. R. 982 (1894); Davis vs. Clinton Waterworks Co., 54 Ia. 59 (1880); Becker vs. Keokuk Waterworks, 79 Ia. 419 (1890); Bush vs. Artesian Hot and Cold Water Co., 4 Idaho 618, 53 Pac. 59 (1895); Wilkinson vs. Light, Heat and Water Co., 78 Miss. 389, 28 So. 877 (1900); Boston Safe Deposit & T. Co. vs. Salem Water Co., 94 Fed. 238 (1899), U. S. Cir. Ct. N. Dist. Ohio; Eaton vs. Fairbury Waterworks Co., 37 Neb. 546 (1893); Ferris vs. Carson Water Co., 16 Nev. 44 (1881); Britton vs. Green Bay Waterworks, 81 Wis. 48 (1902); Nickerson vs. Bridge-

port Hydraulic Co., 46 Conn. 24 (1878); Howsman vs. Trenton Water Co., 119 Mo. 304 (1893); House vs. Houston Waterworks Co., 88 Tex. 233, 28 L. R. A. 532; Foster vs. Lookout Water Co., 3 Lea. 42 (Tenn. 1879); Wainwright vs. Queens Co. Water Co., 78 Hun. 146, 28 N. Y. Supp. 987 (N. Y. Supreme Court 1894); Blunk vs. Dennison Water Supply Co., 73 N. E. R. 210 (Ohio 1905), came up on demurrer."

The plaintiff in each case had stated his case in his own way, with all the completeness possible, setting forth with monotonous sameness just what we have in the case at bar, a contract between the water company and the municipality to furnish a water supply at fire hydrants for fire protection, or else to furnish at fire hydrants a specified pressure; that the plaintiff was a resident of the town and paid taxes or water rates, that there was a fire, that the fire company attended and could have put out the fire and saved the plaintiff's property if the water company had fulfilled its contract with the municipality,

"yet in fifteen (all except Wainwright vs. Queens Co. Water Co., 78 Hun. 146) of these sixteen cases the demurrer was sustained in the lower Court and the case was affirmed above. In three, Beck vs. Kittanning Water Co., 11 Atl. 300 (Penn. 1887); Stone vs. Uniontown Water Company, 4 Pa. Dist. Repts. 431 (1895); Fowler vs. Athens City Waterworks, 83 Ga. 219, 9 S. E. R. 673 (1889), cases the Court below nonsuited the plaintiff and this was affirmed. In three cases there was a verdict for the plaintiff. In the Upper Court the case was in one instance reversed (Akron Waterworks Co. vs. Brownless, 10 Ohio Cir. Ct. Repts 620 (1895); in the other two the order granting a new trial was affirmed (Motte vs. Cherryville Water Co., 48 Kan. 18, 28 Pac. 989 (1892); Town of Ukiah City vs. Ukiah Water & Imp. Co., 75 Pac. 773 (Cal. 1904).

"Of these twenty-two cases, arising in these nineteen jurisdictions, it is worth while to remark that every one went off on the merits of the legal controversy. With the exception of the Missouri (Howsman vs.

Trenton Water Co., 119 Mo. 304 (1893) perhaps, where only the right to sue in contract was considered, not one went up on the form of the action. In every case but two (Nickerson vs. Bridgeport Hydraulic Co., 46 Conn. 24 (1878); Nichol vs. Huntington Water Co., 53 W. Va. 348, 44 S. E. 290 (1903) the pleading was under a code, and it made no difference what the form of the action was, whether contract or tort, and in all of them the plaintiff failed because he had no cause of action upon any theory. In some cases the Court considered both the theory of contract and of tort. (Fowler vs. Athens City Waterworks, 83 Ga.; House vs. Houston Waterworks, 88 Tex. 23, 28 L. R. A. 532; Britton vs. Green Bay Waterworks, 81 Wis. 48; Fitch vs. Seymore Waterworks, 139 Ind. 214; Nickerson vs. Bridgeport Hydraulic Co., 46 Conn. 24; Nicholl vs. Hunting Water Co., 53 W. Va. 348. In some the Court was indifferent to terminology (Wainwright vs. Queens Co. Water Co.; Beck vs. Kittanning Water Co.; Stone vs. Uniontown Water Co.; Foster vs. Lookout Water Co.; Wilkerson vs. Light, Heat and Water Co.; Bush vs. Artesian Hot and Cold Water Co.; Mott vs. Cherryville Water Co.; Town of Ukiah vs. Ukiah Water & Imp. Co.) In others still the Court assumed that if there was any cause of action it must be in contract. (Ferris vs. Carson Water Co., Nev.; Davis vs. Clinton Waterworks, Iowa; Becker vs. Keokuk Waterworks, Iowa; Blunk vs. Dennison Water Supply Co., Ohio.) In Connecticut and West Virginia, the two States which had a common law system of pleading, the action was on the case in tort for damages. (Nickerson vs. Bridgeport Hy. Co., 46 Conn.; Nicholl vs. Huntington Water Co., 53 W. Va.) In both a demurrer to the declaration was sustained, the Court considering whether any action lay either in contract or tort."

Thus we have a solid array of jurisdictions where the plaintiff was denied a cause of action of any grand whatsoever.

"It is a further element of strength in these cases that none of them go off upon the ground that the Court does not recognize any exceptions to the rule that a person not a party to the contract cannot sue on it. On the contrary, all are decided, either explicitly or tacitly, upon the assumption that every recognized exception to that rule is in force. (Howsman vs. Trenton Water Co., Ferris vs. Carson, Eaton vs. Fairbury Waterworks, Davis vs. Clinton Waterworks, Blunk vs. Dennison Water Supply Works) and some of the cases, for instance, for the sake of argument admit the right of any beneral beneficiary to sue upon contract (Wilkerson vs. Light, Heat and Water Co., Howsman vs. Trenton Water Co., Blunt vs. Dennison Water Supply Co.) An independent examination of the law in each jurisdiction where the water cases referred to are decided shows that in every one, except perhaps Pennsylvania * * * and Connecticut * * * cases sustaining the sole beneficiary's right to recover, * * * also the rule that a person not a party to the contract may sue if he be the sole beneficiary of it was recognized. These two constitute the only two and definite exceptions to the rule that a person not a party to a contract cannot sue on it. It is not possible then to distinguish the cases for the defendant on the ground that the jurisdictions where they were decided did not recognize the exceptions which permit third persons in some cases to sue upon contracts to which they were not parties."

The Court in the case of Green Bay Water Co., 81 Wis. 48, has well said:

"This Court has no disposition or tendency to engraft new, strange and radical principles on the body of our well established law, under the false guise of progress to meet the spirit of the age. Principles which reason have established and long experience has sanctioned are very apt to be the best that legislative and

judicial wisdom can devise and the safest criterion of judicial action."

Respectfully sumbitted,

I. A. PHIFER,

Of Counsel for Respondent.

RALPH K. CARSON,
KIRKLAND & SMITH,

Counsel for Defendant-Respondent.

Thomas Ruffin
of Counsel